DOCUMENT RESUME

ED 116 229 CS 202 432

AUTHOR Connors, Mary M.
TITLE Prejudicial Publicity: An Assessment. Journalism Monographs No. 41.
INSTITUTION Association for Education in Journalism.
PUB DATE Sep 75
NOTE 41p.
AVAILABLE FROM Prof. Harold Wilson, AEJ Publications Manager, School of Journalism and Mass Communications, University of Minnesota, Minneapolis, Minnesota 55455 ($2.50)

EDRS PRICE MF-$0.76 HC-$1.95 Plus Postage
DESCRIPTORS Behavioral Science Research; *Bias; Civil Rights; *Court Litigation; *Freedom of Speech; Higher Education; Journalism; Justice; Literature Reviews; Mass Media; *News Media; *News Reporting; Publicize
IDENTIFIERS Free Press Fair Trial; *Pretrial Publicity

ABSTRACT

Findings from the behavioral sciences suggest that prejudicial publicity can in some cases influence the outcome of a trial. Studies directed at the jury trial situation yield ambiguous results but provide some evidence that potential jurors can be prejudiced by pretrial publicity. However, the question "Does pretrial publicity bias the verdict?" has only begun to be addressed. In the jury situation, in order to influence the verdict, prejudicial information must survive a series of steps in the trial process: from the initial call as a juror, when the individual's role changes from that of private citizen to that of impartial observer, through diliberation and decision. Each step in the proceeding should make bias less likely to survive. The likelihood that prejudicial information will survive the trial and deliberation process is unknown, although evidence now exists to indicate that it can survive both. (RB)

****
* Documents acquired by ERIC include many informal unpublished *
* materials not available from other sources. ERIC makes every effort *
* to obtain the best copy available. Nevertheless, items of marginal *
* reproducibility are often encountered and this affects the quality *
* of the microfiche and hardcopy reproductions ERIC makes available *
* via the ERIC Document Reproduction Service (EDRS). EDRS is not *
* responsible for the quality of the original document. Reproductions *
* supplied by EDRS are the best that can be made from the original. *
****

U S DEPARTMENT OF HEALTH,
EDUCATION & WELFARE
NATIONAL INSTITUTE OF
EDUCATION

THIS DOCUMENT HAS BEEN REPRODUCED EXACTLY AS RECEIVED FROM THE PERSON OR ORGANIZATION ORIGINATING IT. POINTS OF VIEW OR OPINIONS STATED DO NOT NECESSARILY REPRESENT OFFICIAL NATIONAL INSTITUTE OF EDUCATION POSITION OR POLICY

ED116229

MARY M. CONNORS

Prejudicial Publicity:

An Assessment

PERMISSION TO REPRODUCE THIS COPYRIGHTED MATERIAL HAS BEEN GRANTED BY

Association for Education in Journalism

TO ERIC AND ORGANIZATIONS OPERATING UNDER AGREEMENTS WITH THE NATIONAL INSTITUTE OF EDUCATION. FURTHER REPRODUCTION OUTSIDE THE ERIC SYSTEM REQUIRES PERMISSION OF THE COPYRIGHT OWNER.

Copyright 1975 by the Association for Education in Journalism

---

MARY M. CONNORS is a doctoral candidate in the Department of Communication, Stanford University, on leave of absence from the National Aeronautics and Space Administration, Ames Research Center, Moffett Field, California. She holds M.A. degrees in communication and experimental psychology and has authored over 20 articles and reports in the field of visual perception. Her special interests are in the social and societal effects of communication technologies and processes, particularly within the legal environment. She is currently engaged in research and analysis on the effects of video technology in the trial setting.

CS 202 432

Amplification

Editor
Journalism Monographs

Dear Bruce:

As one who went to Illinois largely because of Wilbur Schramm's presence (only to see him slip away to sunny California a few months later), I'd like to mention a few items that I think should have been incorporated in the listing of his contributions. (JM No. 36, "Contributions of Wilbur Schramm to Mass Communication Research," October 1974)

Although the omission of the original edition (1954) of *The Process and Effects of Mass Communication* may have been an oversight or a typographical error, there are at least two other items, technically unpublished, that shouldn't be lost.

These are: *The Nature of Psychological Warfare*, written with the assistance of Daniel Katz, Willmoore Kendall and Theodore Vallance for the Operations Research Office of Johns Hopkins. It was labeled as Technical Memorandum ORO-T-214, and an edition of 250 copies was duplicated early in 1953. It is an excellent book of some 288 pages.

Another project for USIA resulted in a collection of abstracts (by Hideya Kumata and Raymond Wolfinger), statements abstracted from them, and an introduction making sense of the whole thing on "What We Know About Attitude Chance through Mass Communications" by Schramm. (I won't even try to describe its physical form and other indicia).

Best regards,

John M. Kittross
Temple University

JOURNALISM MONOGRAPHS

NUMBER FORTY-ONE • SEPTEMBER 1975

BRUCE H. WESTLEY, *Editor*

EDITORIAL BOARD

JAMES W. CAREY, STEVEN H. CHAFFEE, DAVID G. CLARK, PETER CLARKE, EVERETTE E. DENNIS, S. WATSON DUNN, RICHARD A. EK, RONALD T. FARRAR, BRADLEY S. GREENBERG, THOMAS H. GUBACK, WILLIAM A. HACHTEN, HANNO HARDT, LAWRENCE W. LICHTY, L. JOHN MARTIN, MAXWELL E. McCOMBS, JACK M. McCLEOD, JOHN T. McNELLY, MICHAEL J. PETRICK, IVAN L. PRESTON, GALEN RARICK, KEITH P. SANDERS, LAWRENCE SCHNEIDER, DONALD L. SHAW, JOHN D. STEVENS, DWIGHT L. TEETER, DAVID H. WEAVER, FREDERICK T. C. YU.

Members of the AEJ Publications Committee: DWIGHT L. TEETER *(Chairman)*, DONALD R. GRUBB, ROBERT V. HUDSON, PHILIP J. TICHENOR, JOHN STEVENS, MAXWELL E. McCOMBS.

Published serially at Lexington, Kentucky, by the Association for Education in Journalism with the support of the American Association of Schools and Departments of Journalism.

Manuscripts and other editorial correspondence should be addressed to the editor, Prof. Bruce H. Westley, School of Journalism, University of Kentucky, Lexington, Kentucky 40506. Business correspondence, including subscriptions, should be directed to AEJ Publications Manager, School of Journalism, University of Minnesota, Minneapolis, Minnesota 55455.

Subscription rates: $10.00 per year, $10.50 outside the United States and Canada. Checks should be made out to Journalism Monographs.

Contents

Introduction 1

The Controversy 3

The Behavioral Research 15

The Direct Evidence 20

Conclusions and Recommendations 25

Notes 32

(Prior Publication)

Introduction

In the legal literature, the influence of the media on trial justice is usually referred to as "the conflict between a fair trial and a free press," or "fair trial *v.* free press." In the journalistic literature it is more often called "free press *v.* fair trial." Both point to the basic antagonisms that exist between the values and goals of the journalistic system and those of the legal system. Each claims prior rights. However, the Constitution's framers, aware of the requirements for a fair trial but schooled, to their regret, in the effects of secret proceedings, refused to grant precedence to either. The conflict between these giant institutions surfaces in many ways, but much of the conflict concerns publicity surrounding criminal trials.

Regarding court issues, the media claim the right to disseminate information (based on guarantees of the First Amendment to the Constitution) and to gather information (based on both First Amendment rights and the Sixth Amendment right to a public trial.) However, the special right of the media to gather information has never been affirmed by the high court. For instance, in Branzburg *v.* Hayes (408 U.S. 665, 1972) the Supreme Court, while acknowledging the special need of the media to gather information, said: "The First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally."[1]*

The media base the need for access to the judicial system on the following argument. Although at one time a trial was "public" if spectators were not barred from the courtroom, today the possibility that some members of the public could attend a trial is not sufficient. In our specialized society it is not possible for the public to be informed of events of public interest without the intervention of the media. Therefore, it is the responsibility of the media to inform the public concerning public issues, and this the media must do as they see fit.

* Notes are given at the end.

The judiciary fears that the media, in pursuing their own interpretation of the public interest, will interfere in the legal process, and particularly with the requirement of an impartial jury, a jury which must be selected from the very community served by the media. Each side believes the interests it seeks to protect are paramount, while each questions the real motives of the other.

The term "fair trial *v.* free press" itself emphasizes the best of both sides: it is said that the law is as much interested in an efficient trial, one concluded without likelihood of appeal and without outside challenge to its authority, as it is in a fair trial. Some even suggest that, in fact if not in theory, the defendant is the least of the concerns of the legal system.[2] On the media side, the value of informing the public can be reduced to "giving the public what it wants," resulting in a style of reporting that seeks, not truth, but, as Swindler observes, "the level of the lurid and the salacious."[3] Taking the more moderate view, the courts fear that pretrial publicity may inflame the community and this, together with actual distortion of facts, can deny the defendant a fair trial. The media counter that it is their obligation to inform the public of public events and the operations of public institutions. They assert that only by shedding light on their day-to-day functioning can the courts be held to a high standard of justice.

The sections that follow treat the historical evolution of decisions related to the fair trial/free press issue in the area of "prejudicial" publicity, summarize the evidence concerned with the effects of such publicity and give an assessment of the solutions proposed to deal with this problem.

The Controversy

CLEARLY the media desire greater access to the courts than they now enjoy. Photographers and the broadcast media continue to be excluded from the courts in most jurisdictions even though the main arguments on which their exclusion has rested (disruption of proceedings, distraction of participants, etc.) long since have ceased to apply.[4] It will be assumed that the question being considered here is not whether media rights will be extended, but whether the media will retain the freedoms they now exercise.[5] Those who speak for the media are virtually unanimous in their determination to retain at least the present level of access. Representatives of the legal profession differ among themselves on this issue.

Some who would restrict the media argue that the public's right to know is not a constitutional right, and is in fact one that has been "frequently restricted."[6] They remind the press that the constitutional guarantee of a public trial is the right of a defendant, not the right of the public. Others view the media as an enemy with which they are locked in combat. Addressing the issue of broadcast access to the courts, McCullough writes:

> For the present, the TV and radio interests have been repulsed, but we may be sure that the powerful TV interests will return to the attack. . . . Just as we must defend and rewin our liberties in each generation, so we must be prepared to meet the TV interests again and again at the courtroom door.[7]

Others find themselves uneasy about the possible effects of pretrial publicity, but emphasize the important functions the media fulfill as "watchdog of the judicial system, weapon against corruption of police, prosecutors and other law enforcement personnel, reducing community anxiety about what police are accomplishing."[8] Even those most critical of the press draw the distinction between crime reporting in general (which they believe the

media should be free to do) and reporting events which "impact the democratic process and individual liberties"[9] which they believe should be restricted.

One judge[10] even argues that crime reporting should be expanded to include background and interpretive reporting of all crimes and by reporting what happens after crimes. The intention is to enlist concern by reminding the public of its own responsibilities.

The Evolving Standard

In 1918 the courts upheld a contempt conviction against the Toledo Newspaper Company on the grounds that publications in the Toledo *Bee* critical of the court's handling of a case had "tended to obstruct justice." In 1941 this interpretation of obstruction of justice was to be severely restricted. In Nye *v.* U.S. (313 U.S. 33, 1941) the court ruled that an act had to be committed near the courthouse to qualify as an "obstruction." In the same year the court adopted the "clear and present danger" principle under which an act was not considered a threat unless it could be demonstrated that the magnitude of the threat and its immediacy to the situation constituted a danger to society itself. The first cases concerning the media from which this principle evolved (Bridges *v.* California, 314, U.S. 252, 1941; Pennekamp *v.* Florida, 328, U.S. 331, 1946, and Craig *v.* Harney, 331, U.S. 367, 1947) did not involve jury trials but the ruling was extended to them in Baltimore Radio Show *v.* U.S. (193 Maryland 300, 67 Alt. 2d, 497, 1949.) The implication of the ruling was that judges and jurors were presumed to be impartial until evidence to the contrary was established.

In 1961 (Irvin *v.* Dowd, 336 U.S. 717, 1961) a murder conviction was vacated and remanded because the jury was found to have been prejudiced by newspaper, television and radio coverage. This case introduced what has come to be known as an "either/or test." If actual prejudice on the part of jurors—or publicity of such a nature and extent as to make prejudice a reasonable assumption—could be established, then impartiality could not be presumed.

In Rideau *v.* Louisiana (373 U.S. 723, 1963), a conviction was reversed because a film showing the defendant confessing was televised in the area from which the jury was to be drawn. In

1965 (Estes *v.* Texas, 381 U.S. 532, 1965) a decision was reversed both because the case was widely publicized and because the trial was televised. Likewise, in Sheppard *v.* Maxwell (384 U.S. 333, 1966), a conviction was reversed on two grounds affecting media —adverse press coverage and domination by the media of the courtroom itself. Since Irvin *v.* Dowd, the judicial consensus has been that for where a substantial segment of the community is exposed to prejudicial publicity, the publicity itself is assumed to constitute a hostile community atmosphere.

The legal evolution of prejudicial publicity was for a time confounded with the concept of obstruction of justice. It was as if, given that the media were not guilty of obstructing justice, the jurors had not been influenced. However, the clear trend has been away from placing the burden of proof on the defendant to demonstrate prejudice and toward assuming that a prejudicial report biases jurors.

Wave of Interest

Although interest in the fair trial/free press question has been a continuing one, the latest and strongest wave of interest resulted from the large number of highly publicized trials and other events of the early 1960s. These included the trials of Billie Sol Estes and Sam Sheppard, the assassination of John Kennedy, the report of the Warren Commission, the shooting of Lee Harvey Oswald and a number of Supreme Court decisions. Pickerell and Lipman note that between January, 1963, and March, 1965, over 100 criminal cases were appealed on claims of prejudicial publicity.[11] Since reversing convictions has not been an acceptable method for handling such cases, there was a rush in legal circles to "do something," and the formation of various councils resulted.

The most widely publicized council was the ABA Project on Minimum Standards for Criminal Justice, Fair Trial and Free Press. On October 2, 1966, this council issued a tentative draft of its findings. Commonly known as the "Reardon Report," it was adopted by the ABA's House of Delegates in February, 1968. As summarized by Reardon and Daniel,[12] the report concludes that substantial contributions to justice are made by the media and that no steps should be taken to impair media effectiveness; that in a significant number of cases dissemination of information during the pretrial and trial process poses a treat to the fairness of the

trial and that the number of cases so threatened is greater than commonly thought; and finally that efforts to control the flow of information should be directed to the source of this information—for the most part attorneys and law enforcement officials. Put more directly, the Reardon Committee may have wanted to restrain the press, but saw no constitutional way to do so. Furthermore the Supreme Court (in Sheppard *v.* Maxwell) refused to deal with the question. The committee recommended strongly that the courts exercise control over attorneys, law enforcement personnel and the like, as an indirect control over those over whom they had no direct control: members of the press. The Reardon Report affirmed the right of the media to print what information they could obtain but at the same time took steps to restrict them in obtaining pretrial information. The committee did not oppose the use of contempt powers against the media; instead it recommended that such powers be used only when utterances were "calculated to affect the outcome of the trial."[13] The responses of state bar associations to these recommendations were not enthusiastic.

The report of the Special Committee on Radio, TV and the Administration of Justice of the Bar Association of the City of New York (1967), generally known as the "Medina Report," arrived at virtually the same conclusions as the Reardon Committee but suggested different remedies. The Medina Committee did not believe that the media could be included in any use of a contempt power resulting from publication of information. Both the Reardon and the Medina Reports agreed that Canon 20 of the Canons of Professional Ethics should be revised to exert greater control over the utterances of lawyers. Both groups stressed the need for self-discipline on the part of the legal profession.

Still another committee report appeared on the scene in 1968. The Judicial Council of the U.S. had convened its standing committee on the Operations of the Jury System, which in turn convened a Subcommittee to Implement Sheppard *v.* Maxwell. After two years of deliberation, this group put out its findings in what has come to be known as the Kaufman Report, and they led to conclusions similar to those of the Reardon and Medina Committees: that the flow of inadmissible information should be controlled by controlling those over whom the courts have juris-

diction. In addition, the Kaufman Report spelled out special orders for use in widely-publicized and sensational cases.

The response of the media to the recommendations of all three committees was unenthusiastic and this surprised and disappointed those on the committees who considered their own position *vis-à-vis* media to be, at the very least, indulgent. After hearing the reaction of journalists, Judge Medina was quoted as saying, "Frankly, I think those people don't know who their friends are."[14]

The media saw in these reports a dangerous trend in inhibiting press access to information and setting an unhealthy tone that portended still further restrictions. They felt that many of the recommendations in these reports are based on reactions to Sheppard *v.* Maxwell, a case in which legal authorities more or less agree that the court failed to use powers at its disposal, not that additional restrictions were needed. The judiciary, they argued, is claiming the right to control the activities of the police, yet the police are responsible to the executive, not the judiciary.[15] Furthur, after the ABA adopted the recommendations of the Reardon Committee, rulings appeared in the form of "protective orders" or "gag rules." Attorneys Warren and Abell argue that prior restraint is plainly censorship, a right the courts cannot legitimately claim. They called such restrictive orders the "crabgrass in the garden of free speech."[16] Even where such restraints are limited to those over whom the courts exercise control, such as attorneys, they argued, the Supreme Court has never found that the right to free speech can be abridged because of occupation; even for an officer of the court, clear and present danger must be shown.

The status of prior restraint rules is currently in question. In October, 1973, the Supreme Court refused to hear the case of two aton Rouge, La., reporters (Dickenson *v.* U.S., 465 F 2d 496, 1972) whose contempt conviction for violating a prior restraint ruling had been upheld by the Louisiana Court of Appeals.[17]

In 1967 the American Newspaper Publishers Association (ANPA) formed a committee which issued its own report,[18] concluding that the presumption that pretrial publicity is prejudicial is based on conjecture, not fact, and that restrictions should not be placed on the press in the absence of evidence. It maintained that the right to a free press is the right to the free flow of infor-

mation, and that this right is as much abridged by cutting off the source of information as it is by cutting off the means of distribution. It also contended that, since no one can legitimately be forced to give information to the media, no one can be prevented, legitimately, from doing so. The ANPA established a subcommittee to prepare a report on the actual impact of pretrial publicity on jurors in criminal cases.

What Constitutes Prejudicial Publicity

There is no clear agreement on what constitutes prejudicial publicity. Richardson defines it as "Any publicity which reasonably is calculated to prevent an accused from having a fair trial under the constitution,"[19] while LeWine would call "prejudicial" "anything that influences the opinion of the reader—particularly as to the guilt of the accused."[20]

The first definition emphasizes the information communicated, the second the actual effect on the reader. The latter definition has been called into question because it is "impractical to subject judge and jury to psychological exams in order to determine whether certain publicity had, in fact, affected judgment values adversely."[21]

Whether prejudicial publicity is certain kinds of materials (regardless of effect) or certain kinds of effects (regardless of materials or intentions), there is considerable agreement as to what kinds of revelations tend to produce particular undesirable effects. Among the types of disclosure commonly regarded as constituting or resulting in prejudicial publicity are:

- Disclosure of a confession.
- Disclosure of a prior criminal record.
- Inadmissible evidence.
- Statements of investigating officers or prosecuting attorneys concerning evidence of guilt.
- Statements of the defense attorney regarding an insanity plea.
- Statements of the defendant's refusal to take a lie detector test or to cooperate in other ways.
- Suggestions of reprisals in the event of an unpopular verdict.
- Publication of a photo of the accused where identification is an issue.
- Anything arousing passion such as the publication of gory scenes of a crime.

Regarding the influence of the time of publication, LeWine argues that the greatest effect may be anticipated from information made available prior to trial.[22] Most information concerning the case is promulgated at the time of the crime and the initial arrest.[23] Information made available during a trial is of course under the control of the court. Information made available following a trial could influence a retrial, but this concern is remote.

Although it is not clear that prejudicial publicity affects jury trials alone, it is these that have received the most attention. After the Reardon Report focused attention on the problem and the ANPA Committee took the view that its effects are not known, several studies appeared which attempted to assess both the incidence of pretrial publicity and its probable effects, if any.

Data from the State of California for 1969 (as reported in Warren and Abell) show that of more than 1.25 million arrests of all kinds, only 0.25% resulted in felony jury trials. The authors conclude that few criminal matters receive any publicity whatsoever and fewer still receive the kind of publicity that might pose a threat to a fair trial.[24] Hough, under the sponsorship of the ANPA, looked at the disposition of felony cases in one criminal court in the city of Detroit for a six-month period and found that fewer than 5% of felony warrants eventually came to a jury trial.[25] A survey in Los Angeles County covering a five-year period revealed about 200,000 criminal felony filings and about 10,000 felony trials.[26] Hough found that one Detroit newspaper named 32 persons in news stories of criminal cases in one month, but only six eventually had a jury trial. One was acquitted and five were found guilty.[27] No comparable statistics are presented for those who had received no publicity. During the five-year period examined by in the Los Angeles County study, in only ten trials did prejudicial publicity become an issue.[28]

Another way of assessing the extent of pretrial publicity has been to examine defendant complaints. Siebert, also under the sponsorship of the ANPA, found that of a sample of 483 federal and state judges, 25% report having been asked in the previous year for a change of venue because of prejudicial publicity; twenty percent of these requests were granted.[29] Siebert reports that responding judges, over their entire careers, had granted motions for new trials based on a claim of prejudicial publicity in 35 cases (5.6% of those who had brought such motions.) A study covering

mid-1964 to mid-1966, reveals that of 40,000 jury trials of felony cases nationwide, the question of news reports was raised in 51 cases. Relief was granted in six. In three cases relief was based on the determination that the judge had not exercised perorgatives available to him during the trial (forbidding jurors to read newspapers, change of venue, etc.). Although in no case was relief granted solely on the argument that media coverage had made a fair trial impossible, it may be inferred that media performance played a role in three cases.[30] Stanga reports that in the three years beginning with 1966 there were 202 cases decided which involved prejudicial publicity. Of these, only 12 resulted in either setting aside or reversing a conviction. Of the 12, six involved jury exposure or possible exposure during the course of the trial. (Stanga found a greater tendency to reverse for publicity that reaches a jury during trial than for pretrial publicity.) Of the six cases involving pretrial publicity, five were reversed because the court had failed to exercise the authority available to it (dismissing jurors, changing venue, effectively utilizing voir dire, etc.) Only one conviction was set aside for the specific reason that potentially prejudicial publicity had reached the jury (the jury had been given the defendant's past criminal record), even though no bias was demonstrated.[31] Former Justice Tom Clark has remarked that only about five of the 3,500 cases a year coming for consideration before the Supreme Court involve a conflict between the freedom of the press and the rights of the defendant.[32]

One might ask if the questions raised by these investigators are the correct ones on which to base a judgment concerning the pervasiveness of pretrial publicity, and its effects. For instance, does an account of those who have successfully argued their cases on this basis really tell us anything about the extent of the problem? Or, does the fact that the issue is raised aid the assessor? Within the adversary system, assertions that publicity has precluded a fair trial may represent a strategy for appeal rather than an honest belief that publicity produced effects. More fundamentally, one might question whether the extent of the problem is itself a valid consideration. The facts appear to support the view that those who are subjected to potentially prejudicial publicity are a relatively small percentage of those who are accused of crimes. One must then decide whether this does, or should, lessen the concern.

Remedies Available to the Courts

One fact is certain—pretrial publicity complicates the work of presiding judges. Aside from the disputed right to control the press (or those who might talk with the press) the courts possess certain undisputed rights to guard against the possibility that prejudicial publicity will influence trial outcomes. Among the methods open to the court are: change of venue, venire from other jurisdictions, voir dire, sequestration of the jury, admonition by the judge, and severance and continuance.

Siebert solicited the opinions of judges as to the effectiveness of these measures in guarding against possible negative effects of prejudicial publicity. Seventy-seven percent of the responding judges thought the change of venue method was moderately effective; 23% believed it ineffective. Choosing a jury from another venire does not appear to be a popular option: only 12% of responding judges could ever remember having such a request. Voir dire examination scored high, with 80% of the judges believing it to be an effective means of dealing with pretrial publicity, while only 5% viewed it as ineffective. Eighty-seven percent of the judges believed sequestration to be effective, 13% thought it ineffective, but only 25% used it frequently and about half never used it. About 82% of the responding judges said that they did admonish jurors; of those who did, about 70% said that they had never had any reason to believe that the jury had not complied. Of the remaining methods, about 75% thought that they were either "very effective" or "moderately effective" in countering the effects of pretrial publicity.[33]

Willingness to seat jurors who had been exposed to publicity varied widely, both among judges and from region to region. For instance, a venireman who says that he has read of a case in the press but maintains that he can disregard what he has read will be accepted "always" by 16% of the judges in the Pacific region, but by only 2.5% of the judges in the Northwest.[34] On the question of eliminating a potential juror because he admits to having heard of a confession, 29% of the judges said that they "always or practically always" sustained such a challenge, while 36% of the judges said that they "never or practically never" sustained such a challenge. The rest of the judges were divided among the categories of "most of the time" "about half the time" and "occasionally." This U-shaped distribution seems to

indicate a U-shaped belief on the part of judges as to whether pretrial publicity concerning a confession can effectively be dissipated by the process and events of a trial. On the more general question of whether a juror could make a fair and impartial judgment, although informed, about three out of four responding judges believed they could.

The judges were asked their opinions on the appropriateness of publishing certain facts. Ninety-six percent believed it inappropriate to print information about a confession; 94% thought it inappropriate to publish the results of tests or the fact that the accused had refused to submit to tests, while 86% thought that mention of a criminal record was not appropriate. (The surveyers did not ask the judges what they believed the effects of such publication might be.)

On the question of allowing the press to be present, 73% of the responding judges said that they would allow the press to remain while the admissibility of evidence was argued out of the presence of jurors. (Many noted that the press is rarely present.) Twenty-six percent of the judges reported warning the press periodically against publishing certain materials. Of those, only 11% could remember any incident where the press had disregarded the warning.

A study which dealt with practices and attitudes of judges towards access by the media also is reported by Siebert.[35] The practice, overwhelmingly, is to allow notetaking reporters, while prohibiting all recording equipment (and thus reporters who depend on such equipment). However, responses to the question of what should be allowed were somewhat more favorable to the media representatives now excluded and somewhat less favorable to those now admitted. For instance, 93% of the judges prohibited picture-taking in the court, although only 88% thought that such picture-taking should be prohibited. Only 4% barred reporters from preliminary hearings but 13% thought they should be excluded.

In addition to the tactics which the court may employ during trial to deal with pretrial publicity, certain remedies are available after trial. These include appeal, mistrial and habeas corpus. The respondents in Siebert's study believed these measures, particulary motion for a writ of habeas corpus, to be ineffective in countering the effects of prejudicial publicity. Even if such

measures did help redress any possible wrong done to the defendant, they are wasteful of the court's resources and thus inefficient remedies.

The Behavioral Research

An editorial in the New York *Times* of November 18, 1964, reads: "No individual can receive a truly fair trial if before it is held the minds of the jury have been influenced or inflamed by one-sided, incomplete, prejudicial, or inaccurate statements." The language of this statement makes the conclusion difficult to debate. Yet the conclusion—that there is a direct relationship between publicity and the ability of jurors to approach a trial fairly and openly—has been extensively debated. We need to assess what is known about this problem.

One approach is to examine what may be learned from the more generalized studies in the behavioral sciences, particularly from those studies concerned with how man organizes information. This section considers how what is known from the behavioral sciences might be applied to the issue of the effects of prejudicial publicity on jurors. (The assumption here is that the publicity runs counter to the defendant's case.)

Goggin and Hanover pose two question (Is or is not a belief in guilt formed by exposing individuals to incriminating facts? If a belief in guilt is so formed, does it prevent a juror from being impartial?).[36] They attempt to answer these questions by drawing on the findings of social psychology. They conclude, mainly on the work of Krech and Crutchfield)[37] that man will organize whatever material he has, no matter how sparse or incomplete, into a coherent whole, then interpret it according to his own needs, not the least of which is the need to form his beliefs in such a way that he will receive social approval. Once formed, his beliefs will tend to be absorbed into the existing belief structure and will be resistant to change. The belief structure includes unconscious as well as conscious elements. If at the unconscious level, it will be more resistant to change. These propositions form a basis on which to consider the possible effects of prejudicial publicity, remembering that people tend to accept as reliable what is presented to them through the media, especially television.[38]

Warren and Abell enumerate a progression of events which taken together could jeopardize a fair trial.[39] Their recipe for injustice reads:

- A juror receives information through the press.
- It is information beyond that ultimately introduced into evidence.
- He remembers this information.
- He develops a preconceived idea therefrom as to the guilt or innocence of the accused.
- He conceals bias on voir dire.
- Ignoring the court's instructions, he considers the extrinsic data in deliberations.

Wilcox uses a similar sequence in attempting to predict the effect of a particular piece of evidence on the verdict, particularly the effect of the message upon images, perceptions, attitudes and behavior. These he relates to the cognitive, affective and conative aspects of the decision process.[40] Wilcox's outline for considering evidence from the behavioral sciences is used here to assess impacts at various stages of the trial process.

The Trial Opens

Wilcox concluded from his own studies and from those of Dow[41] that crime stories are organized differently from other kinds of information and that they have a strong affective (emotional) component. Identification with the criminal is minimal. Many prospective jurors are unable to distinguish accusation from guilt. Also, as Goggin and Hanover point out,[42] there is a tendency to go beyond the data in organizing a consistent reaction.[43] Asch has found a tendency to form impressions of a central trait.[44] Assuming that an accusation leads to an impression of a central trait, other information may later be interpreted in terms of this trait. In addition, Norris has noted the tendency for "closeminded" people to fail to separate the source of the message from its content.[45]

As applied to the trial situation, some jurors may fail to concern themselves with whether the evidence was presented in the courtroom or through the media. Bias may exist before court is convened, although this bias may be deeper than anything that can be explained by media coverage, a point that will be considered later.

Jury Selection

It may be expected that prospective jurors will best remember items that are repeated, central ideas rather than details, and things that they relate to their own individual lives. Although it may be the "closed-minded" person who first fails to make the distinction between the source and the message, as time passes the message will be remembered while the source is forgotten by other individuals as well. This refers to the Hovland and Weiss "sleeper effect"[46] which finds that information originally rejected as coming from unreliable or unacceptable sources gains acceptance over time as the relation to the source is forgotten.[47]

Broeder concludes that voir dire is ineffective as a screening device but highly effective as a technique for instructing jurors in their obligation to disregard pretrial publicity.[48]

Trial Arguments

Early in the trial the jury is exposed to strong arguments on one side (guilty) and either weak arguments or no arguments on the other side (innocent). According to McGuire's inoculation theory[49] this should result in one of two possible effects. If the juror has been exposed previously to weak "innocent" arguments, the trial should favor the stronger argument when the juror is exposed to two sides. If the juror has been exposed previously to no "innocent" arguments, only to "guilty" arguments, McGuire would predict a judgment in favor of "innocent" when the juror is later exposed to two sides. In either case, this theory does not suggest negative effects for the defendant from pretrial publicity. Because McGuire's work relates to cultural truisms, his findings must be extended to pretrial publicity with caution.

Closely related to inoculation phenomena is the research on one-sided and two-sided communications. Lumsdaine and Janis have found that subjects exposed to a one-sided communication (for instance, prejudicial publicity) are more likely to shift to the opposite view when later presented with counterpropaganda (as in the courtroom) than are subjects who originally heard a two-sided argument.[50] In this research both "one-sided" and "two-sided" arguments advocate the same position. The difference is that in the "two-sided" argument a small number of counterarguments is presented in an effort to defuse the effects of these and similar arguments when the subject later is exposed to them.

Thus it would appear that prejudicial publicity is not most effective when totally "one-sided." This would be true especially if jurors were highly intelligent, since Hovland *et al.*, have found that "two-sided" arguments are more convincing to those who are more intelligent, where one-sided arguments are more convincing to those who are less intelligent.[51]

As to the time sequencing of prejudicial publicity and trial arguments, an early experiment by Lund found that when subjects were presented first with one argument and then with an opposing argument, the position taken by the subjects shifted first in the direction advocated by the first argument and then in the direction advocated by the second.[52] A similar tracking effect has been found among jurors. Weld and Riff have found that simply reading the indictment leads to a belief in the guilt of the accused, but in subsequent phases of the trial, judgments of guilt or innocence tend to shift with the evidence as it is presented.[53]

Data from studies of primacy-recency effects make contradictory predictions concerning the effects of pretrial publicity. There is reason to believe that the second message (the trial) would carry more weight than the first (the prejudicial publicity), since the effects of the first message largely will have been dissipated through forgetting. Weld and Riff have confirmed one form of recency effect in the courtroom involving only the trial arguments themselves: that the presentation of all the prosecution's arguments, followed by the presentation of all of the defense's arguments, tends to produce the most findings of "innocent."[54]

However, there is evidence favoring the primacy effect where predudicial publicity is concerned. Miller and Campbell have found that, while the earlier message has a higher probability of being forgotten than the later message, especially if the two messages are separated in time, the earlier message also has a higher probability of being believed.[55] Rosnow finds that primacy has an advantage in those cases where the topic is controversial, familiar and interesting.[56] He concludes that two of the three conditions favoring primacy (controversial and interesting) are present in most cases involving pretrial publicity. So is "first impression," which Kelley has found to persist where a central dimension of personality is involved.[57]

Nevertheless it is extremely difficult to determine what effect may be anticipated simply from having been exposed to prej-

udicial publicity first. In any case, strong arguments may be expected to overcome order effects, as Rosnow suggests.[58]

Admonitions

It is the duty of judges to instruct jurors to disregard all inadmissible evidence, including that gained from pretrial publicity. There are two questions regarding judicial instructions as they relate to prejudicial publicity: Do jurors discuss inadmissible evidence during deliberations? And can the juror exposed to inadmissible information put it aside consciously or unconsciously? Efforts to resolve these questions have resulted in equivocal findings. The University of Chicago jury project did find jurors generally take seriously their roles and the instructions of the court, which suggests that jurors may at least attempt to disregard inadmissible material.[59]

Deliberations

Indications from social psychology are that the deliberating jury will have the effect of moving deviant members towards the views of the majority members.[60] The University of Chicago jury project found that juries rarely move to the side espoused initially by a minority of members.[61] Another area which may bear on the dynamics of jury deliberations concerns the propensity of an individual to take a greater risks after he learns that others are willing to assume more risk than he had believed originally. This phenomenon has come to be known as the risky shift.[62] A plausible explanation of this effect is that individuals like to believe themselves to be higher-than-average on some dimension which they value, particularly if this dimension has a quality of roguishness or abandon about it. After discovering that they are not as risk-prone as they thought, relative to others, they shift to a riskier position. How these group aspects of jury deliberations interact with pretrial publicity is a matter of speculation.

Verdict

The point in the trial process where the cognitive and affective aspects resolve into the conative dimension is the verdict—the act of decision, an act that changes the nature of the deliberation process. Kalven and Zeisel found that judges and jurors tended to disagree on verdicts in very close cases, and that the judges frequently ascribed this disagreement to the fact that they, the

judges, had information that the jurors did not have, such as inadmissible evidence.[63] This suggests that, in close cases, jurors will seek out information, legitimate or otherwise, and use it (as the judges did) more than they would in cases where either guilt or innocence is more clearly established.

The Direct Evidence

Although there is still only limited information from research on the effects of prejudicial publicity on juries, interest in this area is increasing and the body of evidence continues to grow.

In an attempt to determine the relative power of various kinds of information to influence a jury, Wilcox and McCombs gave subjects eight versions of a crime story which contained information on evidence, previous criminal record and confession. They found that information that the defendant had made a confession was the most prejudicial element in the story.[64]

Kline and Jess exposed their subject jurors to either a "prejudiced" (experimental) or an "unbiased" (control) news account.[65] Experimental and control juries were assigned to each of four mock trials of a civil case. Of the four juries that heard the "prejudiced" version of the new account, three decided not to consider it, although in all juries someone referred to this inadmissible evidence during deliberations.[66] The results were inconclusive, however. Of the three "trials" in which the prejudiced stories were rejected, both the experimental and control juries found for the defendant. The fourth jury, which used the inadmissible material gained from prejudicial publicity, found for the plaintiff, but also did the control jury which had not heard the prejudiced information.

In an experiment by Tans and Chaffee jurors were given news accounts which were either "negative" (i.e., the accused confessed or he was said to be guilty by the district attorney), "positive" (the accused denied guilt or was said to be not guilty by the district attorney), or "neutral" (in two out of three cases there was a simple statement that the accused had been detained.) Jurors then completed response forms on which they rated their beliefs as to the guilt of the accused. Belief in guilt was correlated with other negative evaluations of the accused but were not substantially

affected by demographic descriptions. The more information supplied, the more willing were jurors to make a judgment. The most damaging form of evidence was found to be a confession, but the mere fact of arrest implied guilt for many subjects. "Positive" publicity resulted in many fewer judgments of guilt than did either the "negative" or the "neutral" versions, which did not differ significantly from each other.[67]

Hoibert and Stires looked at the effects of pretrial publicity on simulated juries of high school students. They found that prejudicial publicity influenced the judgment of low I.Q. female jurors but not those of male jurors or high I.Q. female jurors. The authors suggest that sex differences might have been expected since the case was one of rape.[68]

Simon's widely-quoted study exposed subjects to a "sensational" news account, including a description of the accused's past criminal record, while other subjects were exposed to a "conservative" news account of the same incident. The sensational account enhanced juror readiness to believe in the guilt of the accused prior to the trial; those who saw the conservative version were more willing to suspend judgment. The trial itself reduced the differences between those who had been exposed to the sensational publicity and those who had been exposed to the more conservative version to the vanishing point. However, Simon's subjects, after hearing the evidence, were instructed that the accused, if convicted, could be executed, which may have influenced jurors to be more scrupulous in considerating the evidence. This study confounded prejudicial news content with a flambuoyant journalistic style, so that the relative influence of these two factors could not be separated.[69]

In a study by Sue and Smith, subjects read either "damaging" or "neutral" news accounts before reading the evidence and arriving at a verdict. Here adverse trial publicity led to more "guilty" verdicts than did "neutral" accounts.[70] It should be noted that subjects read both publicity and trial transcripts in a single sitting, conditions in which pretrial publicity might be expected to show maximum effect. In a second study, Sue, Smith and Caldwell exposed subjects to inadmissible evidence, which led to more "guilty" verdicts when the evidence against the accused was weak, but made little difference when the case against the accused was strong.[71]

The most relevant studies to date, since they duplicate many courtroom conditions, come from the Free Press/Fair Trial Project of Columbia University's Bureau of Applied Social Research under the direction of Alice Padewar-Singer and Allen Barton. Data from this project present perhaps the strongest evidence to date concerning the effects of pretrial publicity on juror judgments. Padewar-Singer and Barton[72] and Padewar-Singer, *et al.*,[73] find that subject jurors who have been exposed to a "prejudicial" news report (a retracted confession and information concerning a past criminal record) are more likely later to judge the accused to be guilty than are subject-jurors exposed to a "neutral" report of the same incident. None of the reports used in this study involved a sensational style of reporting, so that the prejudicing condition was restricted to information. In one phase of the study, jurors from Nassau County, N. Y., were seated without voir dire. They listened to an audio tape recording of a trial based on an actual case. The jurors then deliberated to a verdict (or, after six hours, declared themselves to be hung). Of the five juries exposed to the "prejudicial" condition, 78% of the jurors believed the defendant to be guilty; 22% believed him to be not guilty. Of the five juries exposed to the "neutral" condition, 55% of the jurors believed the defendant to be guilty; 45% believed him to be not guilty.

In another phase of the study, 23 juries were selected from juror lists in Kings County, N. Y. Procedures were similar to those described for Nassau County with several variations. In one variation, thirteen juries were subjected to voir dire by two experienced attorneys, on the basis of which some veniremen were excused. The remaining ten juries were seated without voir dire. Another variation allowed more time for deliberation. Of the ten juries exposed to "prejudicial" publicity, six rendered guilty verdicts, three returned a verdict of "not guilty" and one remained hung. Of the 13 juries exposed to the "neutral" condition, two reached a verdict of "guilty," five found for the defendant and six were hung. A tally of the final votes of individual jurors showed that 69 % of "prejudiced" jurors voted "guilty," compared to 35% of "neutral" jurors.

Assuming that the will of the majority would eventually prevail if jurors were given sufficient time to reach a verdict (a conclusion derived from the earlier work of Kalven and Zeisel),[74] Padewar-

Singer and Barton projected individual juror votes to show that prejudicial publicity would induce twice the number of guilty verdicts as would otherwise be expected, a result statistically significant at the .05 level.

An analysis of voir dire effects is given in Padewar-Singer, *et al.* Jurors not challenged or instructed through the voir dire process voted "guilty" more frequently (78%) after having been exposed to prejudicial publicity than did subjects not exposed to this publicity (12%).[75] Although voir dire had the effect of dissipating much of the influence of prejudicial publicity, there remained a residual publicity effect. After voir dire, those exposed to the prejudicial publicity voted "guilty" 60% of the time; those not exposed to such publicity voted "guilty" 50% of the time.[76] Publicity effects were found to be largest in "close cases."

Jurors in both phases of this study, both those selected randomly and those selected after voir dire, received lengthy judicial instruction. The authors report that such instruction proved to be less effective than voir dire in dissipating the effects of prejudicial publicity.[77]

The Columbia University project provides several valuable insights into the prejudicial publicity issue. This research has demonstrated that information concerning a confession and a past criminal record can translate into verdicts against the accused under conditions closely resembling those of an actual trial. Also significant, it has shown that prejudicial publicity can have effects in the absence of a flamboyant or sensational presentation. The contribution of sensational presentation remains to be determined.

Their data, with those of Sue and Smith[78] lend support to a suggestion from the Chicago Jury Study[79] that inadmissible information such as that gained from pretrial publicity is most likely to influence jurors when other information is lacking and when the decision is a close one.

From the experimental research on the effects of prejudicial publicity on jurors, it seems possible to draw the following tentative conclusions:

- Prejudicial publicity can influence jurors' initial judgments of guilt.
- The trial process itself, in which the voir dire is particularly important, dissipates much of the effect of the prejudicial publicity.

- Publicity does not need to be presented in a sensational fashion to bias jurors.
- Information concerning a confession is the inadmissible evidence most difficult to dispel.
- Prejudicial publicity is most likely to affect jurors when other information is lacking or when the evidence is evenly weighted.

Conclusions and Recommendations

FINDINGS from the behavioral sciences suggest that prejudicial publicity can in some circumstances influence the outcome of a trial. Studies directed at the jury trial situation yield ambiguous results but provide some evidence that potential jurors can be prejudiced by pretrial publicity. However, the question "does pretrial publicity bias the verdict?" has, in all its complexities, only begun to be addressed. In the jury situation, in order to influence the verdict, prejudicial information must survive a series of steps in the trial process: from the initial call as a venireman, when the individual's role changes from that of private citizen to that of impartial observer, through deliberation and decision. Each step in the proceeding, properly conducted, should make bias less likely to survive.[80] We do not know what the likelihood is that prejudicial information will survive the trial and deliberation process, although we now have some evidence that it can survive both.[81]

In a case such as this, where the hypothesized relationship involves many variables that are sequential, diffuse and uncontrolled, establishing a relationship (or demonstrating that it is unlikely that one exists) is difficult. However a convincing, if not definitive, answer can come from a preponderance of evidence gathered from different studies using various methodologies and subject populations. Such was the case in studying the effects of television violence on children.[82] If data can be gathered from various sources, and made comparable, satisfactory answers to the questions implied should be forthcoming.

A major problem with research on the effects of prejudicial publicity on jurors is that the various experiments are not comparable. For instance the Tans and Chaffee study[83] would suggest that no further damage is done once the juror is informed that the accused has been detained, since they found no difference between the "negative" and "neutral" conditions. More recent studies do not confirm this finding, but many studies do not provide enough

information to form a clear picture of what is meant by the "neutral" or "control" condition, while others present a "control" condition of questionable neutrality. For instance, in Sue and Smith, the "neutral" condition included information that a gun had been found in the possession of the accused but that it was not the one used in the robbery, information which could conceivably be interpreted in defense of the accused.[84] Looked at in this way the Tans-Chaffee finding of "no difference" between "negative" and "neutral" publicity is not easily discounted. It seems clear that this area of research needs some agreement on what constitutes a "neutral" or "control" condition. One candidate for the "neutral" condition would be reports containing only that information which would be allowed under the English system, a system of crime reporting which takes a very conservative approach to pretrial publicity. Adopting such a standard as a neutral condition for experimental purposes would allow comparisons to be made more easily among various studies, and at the same time address the question whether any change from our present system of reporting, up to and including the adoption of the English system, would have any real impact on the quality of justice.

The data of Padewar-Singer and Barton provide the first solid evidence that pretrial publicity can be prejudicial in circumstances similar to those of actual trials.[85] Their data provide a baseline against which the effectiveness of various remedies can be measured. However, this observation does not imply that the remedies of which they speak lie outside the prerogatives or the general practices of the courts. Courts do not simply allow pretrial publicity to influence jurors; they are empowered to take steps to counteract such influence. A logical next step would focus experimental attention on the various remedies available to the courts. Padewar-Singer, *et al.*, have made a beginning in attempting to assess the effects of voir dire.[86] Information is needed also on the effects of various judicial instructions[87] and on the role of the juror and his commitment to impartiality. Again, there is the danger that as these studies evolve, procedures will not be specified in sufficient detail to allow evaluation of the study or comparison with other studies. At the very least, all experiments which include voir dire and judicial instructions should report the exact nature of the voir dire and the content of the instructions.

Competent and comparable experimentation is needed to answer many questions concerning the impact of pretrial publicity on eventual jury verdicts. However, an acceptable resolution of the problem of pretrial publicity will depend more on values than on experimentation. Therefore, several additional points should be made. It seems clear that if the media do bias the jury against the accused, the media are not alone in this function. Tans and Chaffee note the tendency to judge an accused "guilty" regardless of publicity. Similarly, their findings that prejudicial information does not damage the accused any more than simply reporting that he was detained, raise at least the suspicion, as Warren and Abell conclude, that the largest prejudicing factor against the defendant is the accusation by lawful authority.[88] And, even if it were established to the satisfaction of reasonable persons that pretrial publicity adversely influences the defendant's chance of an unbiased trial, it must be asked whether conflicting rights make the dissemination of information a societal necessity. Bush has pointed out that pretrial publicity is most apt to appear when the situation is highly ambiguous and unstable, i.e., when the public's need-to-know is most pronounced.[89] Unfortunately, this pressure from the public is greatest in those cases where pretrial publicity is most likely to bias the jury against a defendant. Any solution to this controversy must consider these conflicting values.

Finally, in virtually every piece written concerning the issue of pretrial publicity, it is tacitly or overtly assumed that the individual who is accused of a crime "had the cards stacked against him once the newspapers go to work on the case."[90] This paper began with the same premise, since it represents the problem of greatest concern to the courts. However, the assumption that the media always act to the detriment of the accused must surely be questioned. Particularly in cases where the accused is charged with violations that have political or racial overtones, the media may acquaint the courts and the community from which veniremen are to be drawn with differing value systems. Even if the particular community does not share the defendant's values, it may, once informed, affirm the right of the defendant to act on those values. Two recent studies suggest that such effects may indeed occur. A study by Forbes Research finds many emotional biases against defendants, but significantly few biases against black defendants.[91] This is in marked contrast to the earlier findings

of Kalven and Zeisel, in which Blacks received a negative-sympathy score (sympathy being positively correlated with acquittal).[92] It is at least possible that this difference represents a genuine change which may be due in part to the educational function of the media. Similarly, Friend and Vinson find that under certain conditions jurors tend to "lean over backwards" to compensate for what they believe to be their own biases. Such behavior results in lighter sentences being given to defendants whom jurors find unattractive, heavier sentences being given to defendants whom jurors find either neutral or attractive.[93] This result occurs when the individual making the judgment has made a commitment to be impartial. In this case both the value issue and the juror's commitment are salient to him. Whatever problems the media may be suspected of adding to the trial process, they must be credited with making value differences and biases resulting from value differences more salient; e.g., those biases associated with racial, sexual or political characteristics.

Some Proposals

Seymour proposes four possible solutions to the problem of the potential impact of prejudicial publicity:

- Using contempt powers on the public, including the media.
- Penalizing the disclosure of information by law enforcement personnel.
- Purging proceedings of evidence that has been publicized improperly.
- Adopting voluntary codes of self-restraint by the media.[94]

The first three proposals place the responsibility for action on the courts; the fourth proposal shifts the responsibility from the courts to the media.

The first proposed solution raises serious constitutional objections, the resolution of which must be decided, ultimately, by the highest court. The second suffers from similar if less direct problems. Also, there are other reasons why some on both sides of the fair trial/free press controversy balk at the direct intervention of the law into media functioning. Frank Stanton, until recently president of CBS, believes that statutory control would put the courts in the position of requiring constant surveillance over the media, and more importantly, their intervention would drive a wedge between the courts and the media. He believes

that the restrictions implied by Seymour's first two proposals would damage the democratic process itself.[95] He is joined in this conviction by those who speak for the media and by members of the legal profession. Pierson warns against "overcuring" the situation, and thus creating "new monstrosities more revolting than the old."[96]

Even those who favor the use of statutes prohibiting the press from publishing certain kinds of information have serious misgivings about how violations of such statutes would be handled. Goggin believes that the implications of using contempt charges against the media are so serious that any such use must be accompanied by the right of the journalist to a trial by jury on the contempt charge. On a more pragmatic level, Goggin believes that such statutes could never pass a legislative test because the media are too powerful.[97] This hypothesis may soon be tested.

The third proposed solution has met with little opposition from the media; it does of course add to the concerns of the court. Stanga believes that one positive result of the free press/fair trial controversy which has been argued over the last decade, is that courts are acting more energetically, within existing powers, to protect the rights of the accused.[98] Meyer, a member of the Reardon Committee, has written a guide for trial judges in which he gives a step-by-step account of the options open to a judge in publicized cases. He describes in detail how a judge could and should deal with the question of the press and trial rights.[99] The emphasis here is on the many alternatives, aside from the use of contempt power, available to the judge, in protecting the rights of the accused.

The fourth proposed solution has met with skepticism from those who believe that an unenforceable code is no code at all. However, this proposal has one outstanding point to recommend its adoption. Where it has been tried it seems to work. The ABA and the American Society of Newspaper Editors met in October of 1969 to lay the ground work for voluntary agreements and the ABA has set up a Legal Advisory Committee on Fair Trial and Free Press which has helped establish voluntary agreements in the various states. Guidelines voluntarily adopted by the media were first established in the state of Washington, and that state has had a high level of success with the program.[100] The Washington experiment has served as a guide for other states.

Press-bar agreements, usually containing a statement of principles and a statement of policy (or Fair Trial/Free Press Guidelines) are in effect in 23 states, while similar, less formal arrangements are in effect in most other states. In 1972, the Freedom of Information Committee of the Associated Press Managing Editors conducted a survey on responses to the voluntary agreements.[101] These agreements were generally well received. A majority of editors in 20 of the 23 participating states judged them to be successful, while the majority of judges and lawyers in 18 of the 19 states from which responses were received agreed. A more extensive survey conducted by the ABA Advisory Committee on Fair Trial/Free Press in 1974 revealed similar, generally positive responses.[102]

Mitchell finds that reporting of crime news has undergone drastic changes since the initiation of the agreements, resulting in more restrained reporting.[103] The success of these agreements seems to be due to the fact that they are not simply voluntary codes of self-restraint adopted by the media, but cooperative arrangements entered into by the media, the bar and the courts. The consensus is that these agreements have served as catalysts for greater communication and understanding among jurists, lawyers and reporters, resulting in a steady reduction in the tensions that were prevalent at the time the Reardon Report was released.

Mitchell describes a situation in which the new spirit of cooperation has furnished the mechanism of enforcement. He finds that in most states the enforcement follow-up to an unresolved complaint takes the form of calling the infraction to the attention of the violator's peers on the Guidelines Committee. Discussion follows and usually an acceptable solution is reached. The implication is that the reduction of antagonism among professions has freed peer pressure to be brought to bear on the issue and that this pressure is not as easy to dismiss as pressure from an opponent.

There are, however, broader issues which have little to do with the usual criminal case, which threaten the success of press/bar agreements. The issuance of prior restraint orders and contempt citations against reporters has raised fear on the part of the media that the fair trial principle is being extended beyond all acceptable limits. Clifton Daniel has warned that to deny the press the right to make misdeeds of public officials known for fear that they might be denied a fair trial is a "perversion of the meaning of the Bill

of Rights." He added, "Justice is too important a matter to be left to the law alone. Our constitution never intended it should be."[104]

The situation is very fluid. Press/bar agreements appear to be the best hope for preserving all the freedoms protected by the First and Sixth Amendments to the Constitution. But, press/bar agreements depend on the good will of the participants, and the good will of the media currently is being stressed. In the late 1960s and early 1970s there was a dramatic upsurge in the number of subpoenas issued against newsmen. Newsmen currently are being sentenced to jail indeterminately (i.e., until they cooperate with the court) for refusing to reveal the sources of certain information. Feelings generated by such actions are bound to strain press/bar agreements.

Bush has termed the fair trial/free press controversy a "battle between two good guys."[105] The joint councils, with their voluntary guidelines, have calmed much of the conflict, largely by serving in an educational and familiarizing function. Jurists have learned to respect the honest concern of reporters for information relevant to the public welfare; the press has learned how its behavior affects the legal process and has gained a new appreciation of the care which must be exercised, especially in crime reporting. Whether or not these interactions can continue to provide an acceptable resolution of the conflict must await the test of time and the resolution of judicial decisions on media matters currently pending.

NOTES

[1] For a discussion of the newsgathering rights of the media, see "The Rights of the Public Press to Gather Information," *Harvard Law Review, 87,* May 1974, 1505.

[2] A. S. Blumberg, "The Practice of Law as a Confidence Game: Organizational Cooptation of a Profession," *Law and Society Review, 1,* 1967, 15.

[3] William Swindler, "Commentary on Press Photographers and the Courtroom," as reported in *Kentucky Law Journal,* Canon 35: "Cameras, Courts, Confusion," *51,* 1963, 737.

[4] Canon 35 of the Judicial Code of Ethics of the American Bar Association, which remained virtually unchanged for 35 years, recently has been amended to permit electronic recording under the control of, and for the benefit of, the court. However, the new ABA canon (3A[7]) does not extend media access.

[5] Even the traditional practice of in-court sketching recently has come under question. In the Florida pretrial hearing of the "Gainesville Eight," accused of disrupting the Republican National Convention, the judge ordered that no in-court sketches be made, and further that no sketches be published, even those made from memory following the proceedings. These orders were vacated on appeal (497 F. 2d 102, 1974) and the contempt conviction that resulted from publishing the sketches was reversed (497 F. 2d 102, 1974).

[6] L. F. Powell, Jr., "The Right to a Fair Trial," *American Bar Association Journal, 51,* 1965, 534.

[7] D. H. McCullough, "Trial by Newspaper—Free Press and Fair Trial," *South Dakota Law Review, 12,* Winter, 1967, 1.

[8] R. Kopple, "Constitutional Law—Balancing of Free Press and Fair Trial—Inherent Prejudice from Mass Publicity," *DePaul Law Review, 16,* 1966, 203.

[9] W. R. Hamlin, "Trial by Newspaper: Should It Continue?," *Kentucky Law Review, 54,* 1965, 141.

[10] J. S. Wright, "A Judge's View: The News Media and Criminal Justice," *American Bar Association Journal, 50,* 1964, 1125.

[11] A. G. Pickerell and M. Lipman, "The Courts and the News Media," *The Los Angeles Daily Journal Report,* 1974.

[12] P. C. Reardon and C. Daniel, "Fair Trial and Free Press," Institute for Public Policy Research, Washington, D. C., 1968.

[13] R. T. Haines II, "The Aftermath of Sheppard: Some Proposed Solutions to the Free Press/Fair Trial Controversy," *Journal of Criminal Law, Criminology, and Police Science, 59,* 1968, 234.

[14] *Time,* March 10, 1967, 97.

[15] Freedom of Information Center, "Fair Trial and Free Press: A Dialogue," School of Journalism, University of Missouri, June, 1967.

[16] R. S. Warren and J. M. Abell, "Free Press/Fair Trial: The 'Gag' Order, a California Aberration," *Southern California Law Review, 45,* Winter, 1972, 51.

[17] At the same time the appeals court ruled that the prior restraint order was in violation of constitutional guarantees, 94 S. Court (1973) 270.

[18] American Newspaper Publishers Association, "Free Press and Fair Trial," 1967.

[19] J. R. Richardson, "What Constitutes Prejudicial Publicity in Pending Cases?" *Kentucky Law Journal, 54,* 1966, 625.

[20] J. M. LeWine, "What Constitutes Prejudicial Publicity in Pending Cases?," *American Bar Association Journal, 15,* 1965, 942.

[21] *Harvard Law Review,* "Controlling Press and Radio Influence on Trials," *63,* 1950, 840.

[22] *Op. cit.*

[23] Pickerell and Lipman, *op. cit.*

[24] *Op. cit.*

[25] George Hough III, "Felonies, Jury Trial, and News Reports," in C. R. Bush, ed., *Free Press and Fair Trial: Some Dimensions of the Problem* (Athens: University of Georgia Press, 1970).

[26] Pickerell and Lipman, *op. cit.*

[27] Hough, *op. cit.*

[28] Pickerell and Lipman, *op. cit.*

[29] F. S. Siebert, "Trial Judges' Opinions of Prejudicial Publicity," in Bush, *op. cit.*

[30] As reported in Freedom of Information Center Report No. 18, "Is Pre-Trial Publicity Prejudicial?," School of Journalism, University of Missouri, March, 1967.

[31] J. F. Stanga, Jr., "Judicial Protection of the Criminal Defendant Against Adverse Press Coverage," *William and Mary Law Review, 13,* Fall 1971, 1.

[32] Los Angeles *Times,* May 11, 1967.

[33] Siebert, *op. cit.*

[34] The regional breakdowns given are those employed by the National Reporter System in publishing appellate court decisions.

[35] J. F. Siebert, Jr., "Access of Newsmen to Judicial Proceedings," in Bush, *op. cit.*

[36] T. P. Goggin and G. M. Hanover, "Fair Trial vs. Free Press: The Psychological Effect of Pretrial Publicity on the Juror's Ability to be Impartial: a Plea for Reform," *Southern California Law Review, 38,* 1965, 672.

[37] David Krech and R. S. Crutchfield, *Theory and Problems of Social Psychology* (New York: McGraw-Hill, 1949).

[38] R. T. Bower, *TV and the Public* (New York: Holt, Rinehart and Winston, 1973).

[39] Warren and Abell, *op. cit.*

[40] Walter Wilcox, "The Press, the Jury, and the Behavioral Sciences, in Bush, *op. cit.*

[41] T. E. Dow, Jr., "The Role of Identification on Conditioning Public Attitudes Towards the Offender," *Journal of Criminal Law, Criminology, and Police Science, 58,* 1967, 77.

[42] Goggin and Hanover, *op. cit.*

[43] H. H. Kelley, "The Warm/Cold Variable in First Impressions of Persons," *Journal of Personality, 18,* 1950, 431; J. S. Bruner, K. Shapiro and R. Tagiuri, "The Meaning of Traits in Isolation and Combination," in R. Tagiuri and

L. Petrullo, eds., *Person Perception* (Stanford: Stanford University Press, 1955), p. 277.

[44] Solomon E. Asch, "Forming Impressions of Personality," *Journal of Abnormal and Social Psychology, 41,* 1946, 258.

[45] Eleanor E. Norris, "Attitude Change as a Function of Open or Closed Mindedness," *Journalism Quarterly, 42,* 1965, 371.

[46] Carl I. Hovland and Walter Weiss, "The Influence of Source Credibility on Communication Effectiveness," *Public Opinion Quarterly, 15,* 1951, 635.

[47] The existence of this effect recently has been called into question. See P. M. Gillig and G. Greenwald, "Is it Time to Lay the Sleeper Effect to Rest?," *Journal of Personality and Social Psychology, 29,* 1974, 132.

[48] D. W. Broeder, "Voir Dire Examinations: An Empirical Study," *Southern California Law Review, 38,* 1965, 503.

[49] W. J. McGuire, "Inducing Resistance to Persuasion," in Leonard Berkowitz, ed., *Advances in Experimental Psychology,* Vol. 1 (New York: Academic Press, 1965), p. 191.

[50] A. A. Lumsdaine and I. L. Janis, "Resistance to 'Counterpropaganda' Produced by One-Sided and Two-Sided 'Propaganda' Presentations," *Public Opinion Quarterly, 17,* 1953, 311.

[51] Carl I. Hovland, A. A. Lumsdaine and F. D. Sheffield, *Experiments on Mass Communication: Studies in Social Psychology in World War II,* Vol. 3 (Princeton: Princeton University Press, 1949).

[52] F. H. Lund, "The Psychology of Belief: IV: The Law of Primacy on Persuasion," *Journal of Abnormal and Social Psychology, 20,* 1925, 183.

[53] H. P. Weld and M. F. Riff, "A Study in the Formation of Opinion Based on Legal Evidence," *American Journal of Psychology, 51,* 1938, 609.

[54] *Ibid.*

[55] N. Miller and D. T. Campbell, "Recency and Primacy in Persuasion as a Function of the Timing of Speeches and Measurements," *Journal of Abnormal and Social Psychology, 59,* 1959, 1.

[56] R. L. Rosnow, "Whatever Happened to the Law of Primacy?," *Journal of Communication, 16,* 1966, 10.

[57] Kelley, *op. cit.*

[58] Rosnow, *op. cit.*

[59] H. Kalven and H. Zeisel, *The American Jury,* 2nd Ed. (Boston: Little Brown, 1971).

[60] Asch, *op. cit.*

[61] Kalven and Zeisel, *op. cit.*

[62] However, there are a few instances in which the shift is toward greater caution. For a review of the risky-shift effect, see D. G. Pruitt, "Choice Shifts in Group Discussion: An Introductory Review," *Journal of Personality and Social Psychology, 20,* 1971, 339.

[63] Kalven and Zeisel, *op. cit.*

[64] Walter Wilcox and Maxwell McCombs, Crime Story Elements and Fair Trial/Free Press, unpublished report, University of California at Los Angeles, 1967.

[65] F. Gerald Kline and Paul H. Jess, "Prejudicial Publicity: Its Effect on Law School Mock Juries," *Journalism Quarterly, 43*, 1966, 113.

[66] The fact that someone mentioned the inadmissible evidence does not speak directly to the question of the likelihood that a juror who has been exposed to prejudicial publicity will spread this information in the jury room. In the Kline and Jess experiment *(ibid.)* every juror had been exposed to the same information, and in each jury one of the twelve referred to the issue. Whether the other jurors would have raised inadmissible evidence is a matter for speculation.

[67] Mary Dee Tans and S. H. Chaffee, "Pretrial Publicity and Juror Prejudice," *Journalism Quarterly, 43*, 1966, 547.

[68] B. C. Hoibert and L. K. Stires, "The Effect of Several Types of Pretrial Publicity on the Guilt Attributions of Simulated Jurors," *Journal of Applied Social Psychology, 3* (3), 1973, 267.

[69] Rita James Simon, "Murder, Juries, and the Press," *Trans-Action, 3*, May-June, 1966, 40.

[70] S. Sue and R. E. Smith, "How Not to Get a Fair Trial," *Psychology Today*, May, 1974, p. 86.

[71] S. Sue, R. E. Smith and Kathy Caldwell, "Effects of Inadmissible Evidence on the Decisions of Simulated Jurors," *Journal of Applied Social Psychology, 3* (4), 1973, 345.

[72] Data presented here are from several sources. In addition to information gathered from a New York *Times* article (October 21, 1973, p. 23), data are taken from a Yale University meeting in the Fall of 1972 at which Dr. Singer presented preliminary results, from a meeting of the American Psychology-Law Society in June, 1974, at which Dr. Singer presented additional data, from conversations with Dr. Singer, and from an advance copy of "Free Press-Fair Trial" by Alice Padewar-Singer and Allen H. Barton, which is to appear in Rita J. Simon, ed., *The Jury System: A Critical Analysis*, Sage Publications.

[73] Alice Padewar-Singer, A. Singer and R. Singer, "Voir Dire by Two Lawyers," *Judicature, 57* (9), April, 1974, 386.

[74] Kalven and Zeisel, *op. cit.*

[75] Padewar-Singer, *et. al., op. cit.*

[76] The authors do not provide data on the statistical significance of this difference.

[77] Padewar-Singer *et al., op. cit.*

[78] *Op. cit.*

[79] Kalven and Zeisel, *op. cit.*

[80] Wilcox, *op. cit.*

[81] Padewar-Singer and Barton, *supra*, n. 72.

[82] R. M. Leibert, J. M. Neale and Emily S. Davidson, *The Early Window: Effects of TV on Children and Youth* (New York: Pergamon Press, 1973).

[83] *Supra*, n. 67.

[84] *Op. cit.* This is one of the two independent studies that show a prejudicing effect which survives the evidence.

[85] *Supra*, n. 72.

[86] *Op. cit.*

[87] Whether "judicial instructions" merely advocate impartially or impose specific demands to ignore all information not admitted to the record of the trial is critical in determining the possible power of this legal remedy.

[88] *Op. cit.*

[89] C. R. Bush, "What Have We Learned?," in C. R. Bush, ed., *op. cit.*

[90] Hamlin, *op. cit.*

[91] As reported by L. S. Katz, "The Twelve Man Jury," *Trial, 5,* Dec.-Jan. 1968-9, 37.

[92] *Op. cit.*

[93] R. M. Friend and M. Vinson, "Leaning Over Backwards: Jurors' Responses to Defendants' Attractiveness," *Journal of Communication, 24* (3), Summer, 1974.

[94] W. N. Seymour, Jr., "Trial by TV," *N. Y. State Bar, 40,* 1968, 19.

[95] Frank Stanton, "The Courts and the Broadcast Media," *New Hampshire Bar Journal, 7,* 1964, 12.

[96] W. T. Pierson, Criticisms of News Media by Warren Commission, *Bar Association of the District of Columbia Journal, 32,* 1965, 16.

[97] T. P. Goggin, "Publicity and Partial Criminal Trials: Resolving the Constitutional Conflict," *Southern California Law Review, 39,* 1966, 275.

[98] *Op. cit.*

[99] B. S. Meyer, "The Trial Judges' Guide to New Reporting and Fair Trial," *Journal of Criminal Law, Criminology, and Police Science, 60,* 1966, 275.

[100] R. C. Mitchell, *Denver Law Journal,* Special Magazine Issue, *47,* 1970, 47.

[101] Pickerell and Lipman, *op. cit.*

[102] ABA Legal Advisory Committee on Fair Trial and Free Press, Fair Trial/Free Press Voluntary Agreements: A Handbook, Chicago, 1974, Sec. IV, p. 12 and Supp. A, p. 49.

[103] Mitchell, *op. cit.*

[104] As reported in S. H. Field, "Update on Fair Trial/Free Press in New York," *New York Law Journal,* Nov. 20, 1973, 1.

[105] *Op. cit.*